IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 63

NELSON SIBRON,

Appellant,

vs.

NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

KALMAN FINKEL
GRETCHEN WHITE OBERMAN
The Legal Aid Society
Counsel for Appellant
100 Centre Street
New York, New York 10013

INDEX

SUBJECT INDEX

Table of Authorities

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 63

NELSON SIBRON,

Appellant,

vs.

NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

In the court of appeals, no opinion was written in affirming the conviction. 18 N.Y. 2d 603 (R. 31).* Separate dissenting opinions were written by Judges Fuld and Van Voorhis. 18 N.Y. 2d 248, and 18 N.Y. 2d 603 (R. 31). On September 26, 1966, the New York Court of Appeals amended its remittitur. 18 N.Y. 2d 723 (R. 30). The lower New York courts wrote no opinions.

---

*Referenees to the printed record on appeal are designated "R."

Jurisdiction

The judgment of the New York Court of Appeals was entered July 7, 1966. A timely notice of appeal was served and a statement of jurisdiction was filed on September 2, 1966. An order noting probable jurisdiction was entered on March 13, 1967 (R. 39).

The jurisdiction of this Court rests upon Title 28 U.S.C. §1257(2).

Questions Presented

Whether Section 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments on its face because it authorizes an unreasonable search.

Whether Section 180-a of the New York Code of Criminal Procedure violates the Fourth and Fourteenth Amendments on its face because it authorizes an unreasonable seizure of the person.

Whether, assuming arguendo, that Section 180-a of the New York Code of Criminal Procedure is not unconstitutional on its face, it is unconstitutional by reason of its application to this case.

Constitutional and Statutory Provisions Involved

The New York statute drawn into question is Section 180-a of the Code of Criminal Procedure:

> 1. A police officer may stop any person abroad in a public place whom he reasonably suspects is com-

mitting, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.

2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. Added L. 1964, C. 86, §2, eff. July 1, 1964.

The Constitutional provisions involved are Amendments Four and Fourteen:

Constitution of the United States, Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement

On March 10, 1965, a complaint was filed in the Criminal Court of the City of New York, charging the appellant with unlawful possession of narcotics.

On March 31, 1965 a hearing was held on appellant's motion to suppress 10 bags of narcotics which he claimed were seized after an illegal search of his person. At the conclusion of the hearing appellant's motion was denied. He then pleaded guilty to unlawful possession of narcotics and was sentenced to six months imprisonment.

Appellant appealed to the Appellate Term of the Supreme Court, Second Judicial Department, from the judgment of conviction. The denial of the suppression motion was reviewed upon appeal by virtue of New York Code of Criminal Procedure §813-c.

The Appellate Term affirmed the judgment without opinion (*New York Law Journal*, October 15, 1965). On appeal to the Court of Appeals of the State of New York, the decision of the Appellate Term was affirmed, two judges dissenting (Fuld, J. and Van Voorhis, J.).

At the hearing on the motion to suppress evidence, Nelson Sibron, appellant, testified that on the date in question he was sitting in a restaurant having coffee and a piece of pie when an officer came in and told him to go outside (R. 8). When appellant went outside with the officer, the officer asked him whether he knew what the

officer was looking for (R. 8). When appellant answered no, the officer put his hand in appellant's pocket and removed 10 bags of heroin (R. 8-9). On cross-examination appellant stated he had been talking "about narcotic people" during the period in question (R. 12).

PATROLMAN ANTHONY MARTIN testified that on March 9, 1965, while in uniform (R. 8, 18), he saw appellant continually from 4 p.m. to 12 p.m. in the vicinity of 742 Broadway, Brooklyn, New York (R. 13). During this time appellant "was in conversation with different known drug addicts" (R. 14). Martin fixed the number of addicts spoken to at 6 or 8 (R. 15). The officer observed appellant enter a restaurant. He followed him there and saw him speaking with three drug addicts. Martin approached appellant and told him to come outside. Appellant complied with the order (R. 15-16).

Once outside the restaurant Martin stated "You know what I am looking for" and appellant in response "mumbled something and reached into his pocket" (R. 18). Patrolman Martin put his hand in appellant's pocket and caught appellant's hand as he was about to take out a metal tin foil wrapper (R. 17-18). The officer testified: "I saw in his hand and in his pocket he was ready to grab this cellophane, actually, it was a metal tin foil wrapper" (R. 17).*

On cross-examination the officer testified that when appellant reached into his pocket he thought he might have been reaching for a weapon (R. 17).

---

* It should be noted that the officer in his sworn complaint stated that appellant "pulled out a tin foil envelope and did attempt to throw same to the ground. The officer never losing sight of the said envelope seized it from the defendant's left hand, . . . " (R. 1).

Under the court's questioning the officer explicitly testified that during the period he observed appellant conversing with the drug addicts, he did not overhear their conversations (R. 18).

The trial court initially was disposed to grant appellant's motion to suppress evidence:

> "Mr. Joseph [the Assistant District Attorney] I don't see how I can do anything but grant the motion.
>
> • • • • •
>
> There is no testimony in this record that the police officer heard any conversation between the defendant and any of the unknown men. All he knows about the unknown men: they are narcotics addicts. They might have been talking about the World Series. They might have been talking about prize fights" (R. 18-19).

The Assistant District Attorney then stated to the court that according to appellant's testimony at the suppression hearing, the appellant admitted that he talked about narcotics (R. 19). The court, over objection and despite the fact that the officer testified he did not hear any of these conversations, denied the motion to suppress with the following finding:

> "It is my opinion—this is what I am stating in my action—the police officer's action was predicated on probable cause. Motion is denied" (R. 20-21).*

In their brief to both the Appellate Term and the Court of Appeals, with regard to the issue of probable cause the prosecution took the following position:

---

* The court had previously rejected the theory that the appellant consented to the search (R. 19).

> ". . . that on the basis of the record in the instant case it would not be possible to take a position on the question of probable cause for the record did not indicate whether or not the officer observed any transactions. The record also does not indicate the method of observation: whether the observations was made over an intermittent period or whether the defendant was under constant observation for an eight hour period" (Respondent's brief to the Court of Appeals, page 4).

The prosecution argued that the police officer's stop and search of the appellant was authorized by Section 180-a of the Code of Criminal Procedure. This justification for the search was not advanced at the hearing even though the statute had been in effect for a year.

Appellant argued that Section 180-a was unconstitutional on its face by reason of its repugnancy to the Fourth and Fourteenth Amendments to the Constitution; that Section 180-a was unconstitutional if applied to this case by reason of its repugnancy to the Fourth and Fourteenth Amendments to the Constitution, and that appellant had been convicted in violation of his rights under the Fourth and Fourteenth Amendments.

The Court of Appeals affirmed without opinion, two judges dissenting. Judge Fuld, in his dissenting opinion, stated that Section 180-a of the Code of Criminal Procedure, which authorizes a search upon less than probable or reasonable cause, is unconstitutional. Judge Van Voorhis dissented on the ground that the seizure, without probable cause, of any item other than a weapon is unconstitutional.

Introduction

After this Court's decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the states were confronted with the necessity of reconciling police methods of crime investigation with the citizen's Fourth Amendment right to be free from unreasonable interferences with his person or property.

Although some commentators point to the radical changes in our society as the source of the problem, the dilemma of state law enforcement today in the Fourth Amendment area is one of its own making. The state law enforcement agencies have had 18 years since *Wolf* v. *Colorado,* 338 U.S. 25 (1949) to tailor their practices in accordance with a clear mandate from this Court, yet throughout this whole period no such change in practice resulted.

Before *Mapp,* an official choice between the necessities of law enforcement, as the police viewed them, and the Fourth Amendment guarantees never had to be made. Lip service might be paid to principle, but the day to day practice of law enforcement was shaped by what the agencies deemed necessary, rather than by the Fourth Amendment. After the decision in *Mapp,* such an official choice did become necessary—either the police practices, which had evolved in most states without either legislative or judicial restriction on Fourth Amendment grounds, would have to conform to constitutional doctrine, or constitutional doctrine to current practice.

After *Mapp,* this Court, with full awareness of the problems of law enforcement in a modern society, has emphasized the paramount right of the individual when confronted with the choice. On the other hand, the state's response to this dilemma, caused by prior abdication of

control over police practices, was a subtle and, initially, gradual yielding to the demands of the police at the expense of individual rights. The result was a disheartening step backwards from the new era of personal security which *Mapp* should have produced. Almost without exception, whenever a choice had to be made between justifying the pre-*Mapp* practice in terms of a post-*Mapp* rationale, the traditional concepts were stretched to accommodate police practice.

Where *Mapp* would require exclusion of evidence because a home was searched without a warrant, the courts strained to find consent for the search. The theory of abandonment of contraband became an ever more prevalent ingredient of probable cause. The point of the arrest receded further and further from the point of initial contact between citizen and officer, so that all activity after the initial contact could be utilized as the legal predicate for the arrest. The doctrine of probable cause was itself diluted to an often incredible degree.*

Finally, when it became clear that doctrine and practice could not be reconciled, the New York Court of Appeals abandoned the doctrine in *People* v. *Rivera,* 14 N.Y. 2d 441 (1964), cert. den. 379 U.S. 978 (1965).

---

* This case itself illustrates the extent to which legal principle is molded to insure that the products of a search are not suppressed. Initially the officer's sworn complaint was couched in terms of an abandonment theory. At the hearing, a theory of consent was advanced and rejected. The trial judge was at first disposed to grant the motion to suppress, but ultimately denied it by making a factually unsupported holding of probable cause, relying on information unknown to the officer before he made the search. The District Attorney was unable to support the probable cause finding on appeal, and turned to the stop-frisk rationale, which the Court of Appeals was compelled to utilize even though it was not advanced at the suppression hearing, since no other theory of admissibility remained.

The legislature was not inactive during this period. Its response to this problem was the enactment of Section 180-a of the Code of Criminal Procedure, which authorized the police to detain and question an individual where no basis for making an arrest existed, and to search the individual even though the traditional reason for making a search was absent.

The first opinion construing 180-a relied heavily on the rationale in *People* v. *Rivera, supra,* and held that the 'permissible search' following the 'stop' allowed under common law and section 180-a should be limited to a 'frisk'—a 'patting' of the exterior of one's clothing'. *People* v. *Peters,* 18 N.Y. 2d 238, 245 (1966). The second opinion construing 180-a was compelled to recognize that what police officers did in that case was to search and not to frisk. *People* v. *Taggart,* —— N.Y. 2d —— (1967).

In *People* v. *Taggart, supra,* the court of appeals was confronted with the choice between either adhering to its original limitation on a less-than-probable cause seizure, and by doing so, excluding the evidence, or enlarging the scope of the invasion of privacy to embrace a search in order to find the evidence admissible.

The court chose not to limit the invasion to a frisk but to expand the invasion to encompass a search. In so doing, it acknowledged that in all but one of the previous cases,* although it relied on a frisk concept, it actually was sanctioning searches. Thus the full swing from pre-*Mapp* to pre-*Mapp* was made.

It is obvious that the New York solution is a radical departure from existing constitutional law. We therefore deem it appropriate to assert that its proponents must at

* *People* v. *Rivera, supra.*

least be called on to answer these questions: Can the statute serve the dual function of, on the one hand, protecting the citizens' right to privacy and, on the other, the policeman's need to ferret out crime and for self protection as well as does the traditional standard—probable cause; especially since the traditional standard was itself fashioned in response to these same competing interests of law enforcement and privacy. And if, on balance, the traditional standard must be discarded, is this statute, embodying such a fundamental departure from precedent, the only means available to insure adequate criminal law enforcement and adequate protection for the police officer. *Berger* v. *New York,* 388 U.S. 41 (1967); *Miranda* v. *Arizona,* 384 U.S. 436, 479-491 (1966). While no court can decree that a legislature enact an alternate statute, the fact that alternative, less radical, solutions to the problem exist must be considered in determining the reasonableness of any particular solution when a state has legislated in a constitutionally protected sphere.

POINT I

Section 180-a Is Unconstitutional on Its Face Because It Authorizes an Unreasonable Search.

(1) The Statute Has Been Construed to Authorize a Search.

In *People* v. *Rivera, supra* at 446, and in *People* v. *Peters, supra* at 245, the conduct authorized by subsection (2) of the statute was construed to be a "frisk" of the person, as opposed to a "full blown search," and was defined as a "contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried".

Although no majority opinion was written in this case, from an analysis of the opinion in *People* v. *Taggart, supra,* it is clear that Section 180-a(2) was construed to authorize a search, in line with the literal words of the statute. In *Taggart,* the New York Court of Appeals held that the conduct of the police officer in that case was a search not a frisk (—— N.Y. 2d at ——) and that "under the literal language of the statute, then, [the officer's] 'search' of defendant was justified." —— N.Y. 2d at——. The New York Court of Appeals went on to point out that "in all but one of [its] decisions on this point, the arresting officers engaged in 'searches' rather than 'frisks' in order to obtain inculpating evidence" * (—— N.Y. 2d at ——), and hence there was "ample authority to uphold the legality of the search in this case." (——N.Y. 2d at ——)

* The exception was *People* v. *Rivera, supra.*

After the decision in *Taggart,* there is no need to assume that the only conduct authorized by 180-a(2) is merely a lesser infringement of the right to privacy than a 'full blown search.'* The *Rivera-Peters* construction, limiting 'search' to 'frisk', was formally abandoned in *Taggart.* The conduct authorized by section 180-a(2) is a search, because the New York Court of Appeals has construed the word 'search' in the statute to mean search.

(2) The 'Search' Authorized by Section 180-a(2) Can be Made on a Standard Less Than Probable Cause to Believe That a Crime Is Being or Has Been Committed.

The standard contained in Section 180-a governing when the 180-a(2) 'search' can be made has been construed to permit the search where no probable cause exists.

In *People* v. *Peters,* 18 N.Y. 2d at 246, the New York Court of Appeals stated:

> "Since a frisk . . . is less of an invasion than a full search, it is just that such a frisk may be warranted upon grounds which would not sustain a full search—i.e., grounds less than probable cause."

See also *People* v. *Peters, supra* at 244-5; *People* v. *Pugach,* 15 N.Y. 2d 65, 69 (1964), cert. den. 380 U.S. 936 (1965); *People* v. *Rivera, supra* at 446, 447; and *People* v. *Taggart, supra* at ——.

Section 180-a on its face contains two limitations on the policeman's power to search—first, that the officer must reasonably suspect the person is committing, has committed or is about to commit a felony or any of the crimes

---

* Cf. *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967).

specified in Section 552, and second, that he must reasonably suspect that he is in danger of life or limb.

The second limitation—reasonable suspicion of danger—was construed in *People* v. *Peters, supra* at 245:

> "In addition to the detention which is authorized, the officer is allowed to frisk the suspect if he reasonably suspects that he is in danger of life or limb. Again the standard is the reasonable suspicion of the officer."

The court defined reasonable suspicion as:

> " * * * 'reasonable suspicion' requires satisfactory grounds for *suspecting* that a crime was committed. The difference between these two standards [probable cause and reasonable suspicion] is proportionate to the differences in degree of invasion between an arrest and a detention, between a full search and a frisk."
>
> 18 NY 2d at 246-247 (emphasis in original).

(3) The Statute Authorizes a Search for Any Item Carried by the Individual Who Is Stopped, and Has Been Construed to Authorize the Introduction of Any Item Found on Him or in His Control Into Evidence in a Criminal Prosecution.

On its face, the statute authorizes the officer making the search to take any item from the person "the possession of which may constitute a crime". The New York Court of Appeals has construed the statute to authorize the taking of narcotics *(People* v. *Sibron, supra)* and of burglar's tools *(People* v. *Peters, supra)* as well as the taking of weapons, and has further construed the statute to authorize the use of any of these items in a criminal

prosecution even though the item was seized in cases where the policeman effecting the search had no probable cause to believe that a crime was being or had been committed.

One of the issues to be decided on this appeal is whether a state by statute can authorize a search for any item illegally possessed on the person, or in his control as in *Pugach;* who is in the street, as in *Rivera* and *Taggart;* in a restaurant as in *Sibron;* in custody in a police car, as in *Pugach;* or in the hallway of a private residence, as in *Peters,* where the officer makes the search to discover the illegally possessed item absent probable cause to believe a crime has been or is being committed, and can further authorize the admission of this evidence in a criminal prosecution.

(4) The Statute Is Unconstitutional Because It Authorizes a Search for Evidence of Crime on a Standard Less Than Probable Cause.

The Fourth Amendment is a restraint upon the power of the government to interfere with the citizen's right to the privacy of his property, and where a search of the individual is conducted, with the integrity of his person.

> "What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area * * * There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure."
>
> *Hoffa* v. *United States,* 385 U.S. 293 (1967).

> "The basic purpose of this Amendment, recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society' [citation omitted]."
>
> *Camera* v. *Municipal Court,* 387 U.S. 523, at —— (1967).

The government's power to invade the citizen's privacy is limited even though "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen" (*Camera* v. *Municipal Court, supra,* at —— is the interest of criminal law enforcement. The fact of crime and the existence of criminals does not, *ipso facto,* justify an official intrusion upon privacy. This is graphically recognized in *Camera* at ——:

> "For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found."

The panorama of history behind the Fourth Amendment is the proof of these statements. The primary, if not the sole purpose of the Fourth Amendment, was to eliminate centuries of abuses and invasions of personal liberty and security, caused by the widespread use of writs of assistance and general warrants. Landynski, SEARCH & SEIZURE AND THE SUPREME COURT (1966),*

* Hereafter cited as "Landynski".

19-48; *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment,* 28 U. of Chi. L.R. 664 (1961); *Boyd* v. *United States,* 116 U.S. 616, 626-628 (1886); *Weeks* v. *United States,* 232 U.S. 383, 390-391 (1914); *United States* v. *Rabinowitz,* 339 U.S. 56, 69-71 (1950) (Frankfurter, J., dissenting).

The fact of sedition, a threat to the existence of government itself—did not justify a sweeping search for the author of the seditious material. *Entick* v. *Carrington,* 19 Howell's State Trials 1029 (1765). The existence of contraband pirated into a city without payment of legally imposed taxes was deemed insufficient justification for a general warrant. Landynski, at 31.

In short, the Fourth Amendment embodies the idea that the right of the citizen to be left alone is a more significant value than is the need for the government to enforce its laws. Even so, the Fourth Amendment does not make "the precincts of the home or office . . . sanctuaries where the law can never reach" *Berger* v. *New York, supra* at ——. The right to be left alone does yield to the need of criminal law enforcement where a constitutional standard for official invasion has been met. That standard is probable cause and is often reiterated but nowhere more succinctly put than in *Brinegar* v. *United States,* 338 U.S. 160, 175-6 (1948):

> "Probable cause exists where the facts and circumstances within his [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

The standard of probable cause is the historically achieved tool for reconciling the state's need to enforce its laws with the citizen's right of privacy. In not requiring the police to possess actual knowledge before they act, it does not tie the hands of law enforcement, but in requiring more than the bald suspicion that crime exists, it prevents arbitrary invasions of privacy. *Brinegar* v. *United States*, 338 U.S. at 176.

Probable cause is the only standard ever utilized to determine whether a breach of privacy in the interest of criminal law enforcement is reasonable. This Court has consistently and steadfastly adhered to the probable cause standard in all cases involving breaches of privacy in the interest of criminal law enforcement.*

While some of the earlier American and English cases have spoken in terms of "reasonable suspicion", these words have historically been the equivalent of probable cause. For instance, in *Lund* v. *DuPont*, 3 Wash. 37, the definition was made in this fashion:

> "A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."

---

* In *Camera* v. *Municipal Court, supra*, this Court was careful to state that while other governmental interests may justify an invasion of privacy upon a different standard, this did not endanger the "time-honored doctrines applicable to criminal investigations." This holding marks no departure from precedent. The idea that governmental interests other than criminal law enforcement could justify searches on a different standard than probable cause was recognized in *Carroll* v. *United States*, 267 U.S. 132 at 154 (1924), where Chief Justice Taft stated that while border searches might be made without a specific showing of probable cause because of the requirements of national self protection, searches for contraband within the country could only be made upon probable cause.

See also: *Ulmer* v. *Leland*, 1 Me. 135 (1820); *Stacey* v. *Emery*, 97 U.S. 642 (1878).*

Although the relationship between the first and second clauses of the Fourth Amendment has caused conflict,** no case has ever held that because an officer could, constitutionally, act without a warrant, he was thereby justified in acting without probable cause.

Under one interpretation of the interrelationship between the clauses, a warrant can be dispensed with only in narrow exceptions arising out of emergency circumstances.† A warrant was considered the *sine qua non* of the reasonableness of the search.

Only two situations, both based on necessity, were recognized in which warrantless searches were held reasonable—

---

* When the Uniform Arrest Act was adopted in the state of Delaware, the term "reasonable ground to suspect" was construed by the highest Delaware court as the equivalent of probable cause (*DeSalvatore* v. *State*, 52 Del. 550, 163 A. 2d 244 [1960]):

> "We can find nothing in (section 2 of the Act) which infringes on the rights of a citizen to be from detention except as appellant says, 'for probable cause'. Indeed, we think appellant's attempt to draw a distinction between an admittedly valid detention upon 'reasonable grounds to believe' and the requirement of (section 2) of 'reasonable grounds to suspect' is a semantic quibble. . . . In this context the words 'suspect' and 'believe' are equivalents."

See also *Wong Sun* v. *United States*, 371 U.S. 471, 478 n. 6 (1962) and *Draper* v. *United States*, 358 U.S. 307, 310 n. 3 (1959) defining the term "reasonable suspicion" as used in 26 U.S.C. §7607.

** *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. of Chi. L. Rev. 664, *supra*.

† See dissenting opinions in *United States* v. *Rabinowitz*, *supra*; *Harris* v. *United States*, 331 U.S. 145 (1947); *Davis* v. *United States*, 328 U.S. 582 (1946) and *McCray* v. *Illinois*, 386 U.S. 300 (1967); also majority opinions in *Weeks* v. *United States*, *supra*; *Marron* v. *United States*, 275 U.S. 192 (1927) and *Trupiano* v. *United States*, 334 U.S. 699 (1948).

the search incident to an arrest and the search of a moving car.

Historically, under the early English and American cases, an officer had a right to arrest without a warrant if he had probable cause to believe that a felony was committed. Concomitant with the right to arrest, was the right to conduct an incidental search as a purely protective device and also to avoid destruction of the evidence by the arrested person, Landynski, at 98; *Abel* v. *United States,* 362 U.S. 217, 236 (1960).

The early decisions of this Court explicitly recognized that the sanctioning of the right to search as the incident of a valid arrest had deep-rooted origins in the common law and were based on necessity.

The second exception recognized, the search of the moving car, had no common law origins, but was still based upon a modern necessity. The advent of the automobile caused radical changes in our society, and the new mobility and speed it gave to criminals confronted law enforcement with grave difficulty in apprehending contraband. But even the enormously increased ability of the criminal to transport contraband goods did not cause the Congress or this Court to sanction searches of automobiles on a standard less than probable cause. While the increased speed and mobility obviated the need for a warrant to search the automobile for contraband because of the necessity of acting quickly:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the incon-

venience of indignity of a search. Travellers may be stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

Carroll v. *United States*, 267 U.S. at 153-4.

In *Brinegar*, this Court not only reiterated that the *Carroll* decision permitting the warrantless search of the automobile* was predicated upon a finding of probable cause (338 U.S. at 177) but cautioned that:

"to require less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice." 338 U.S. at 176.

In *United States* v. *Rabinowitz*, 339 U.S. at 66 this Court enunciated the second construction of the interplay between the first and second clauses of the Fourth Amendment. Under this interpretation:

"The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

---

* The opinion never sought to justify the search as incident to an arrest.

While this construction created controversy as to the scope of the search incident to an arrest (contrast *Harris* v. *United States, supra,* with *Warden* v. *Hayden,* 387 U.S. 294 [1967]), it did not affect the fundamental requirement that no incidental search was permissible unless probable cause for the initial breach of privacy—the arrest—existed.*

Furthermore, notwithstanding the *Rabinowitz* decision, this Court has continually stressed that it is preferable to interpose the magistrate between the policeman and the citizen. (*Jones* v. *United States,* 362 U.S. 257 (1960); *Chapman* v. *United States,* 362 U.S. 610 (1961); *United States* v. *Ventresca,* 380 U.S. 102, 106-109 (1965)) and that the standard for a warrantless search is *at least* as stringent as that for a warrant. *Wong Sun* v. *United States,* 371 U.S. at 479; *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964).

While the states have been given freedom to develop workable rules governing arrests, searches, and seizures to meet the practical demands of effective criminal investigation, such rules cannot "violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." *Ker* v. *California,* 374 U.S. at 34.

No decision of this Court has ever held that there is freedom to diminish the requirement of probable cause, and to admit into evidence the product of a search made on a lesser standard.

Beyond history and the decisions of this Court, the reason for this is that probable cause embodies the rational

---

* *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Henry* v. *United States,* 361 U.S. 98 (1959); *Ker* v. *California,* 374 U.S. 23 (1963); *Wong Sun* v. *United States, supra.*

balance between the competing values of privacy and criminal law enforcement and, as such is the constitutional test of reasonableness commanded by the Fourth Amendment's assurance of the right of the people to be secure in their persons and effects. Since the statute discards the standard and destroys this balance, it must be declared unconstitutional.

(5) Probable Cause Is the Only Viable Standard to Assure the Citizen's Right of Privacy.

That which has always been, either stands up to rational analysis or yields to a more compelling rationality. The rationality and hence the validity of probable cause as the constitutional test of reasonableness is the fact that it works well. It is objective—police can understand it, and courts can apply it. It strikes a reasonable balance between police necessity and privacy. It does not prohibit the police from acting in cases where they do not have sufficient evidence to establish a *prima facie* case. *United States* v. *Burr,* 25 Fed. Cas. 2, 12 (No. 14,692a) (C.C.D. Va., 1807). It permits police action on the probability that the individual under consideration has broken the law, rather than only where criminality can be established to a certainty. Yet in requiring the policeman to act on information leading him to believe it is probable that an illegal act has occurred, the standard restrains him from acting upon mere suspicion, speculation, conjecture or surmise. Courts can determine whether, from the facts and circumstances known to the officer, it was probable for him to conclude a crime had been or was being committed, or whether he acted precipitously, upon mere suspicion.

The probable cause formula is not rigid—it permits action upon information not perceived personally by the of-

ficer (*Draper* v. *United States, supra; McCray* v. *Illinois, supra*), and upon information within his particular expertise—*Johnson* v. *United States,* 333 U.S. 10 (1948); *Brinegar* v. *United States, supra; Carroll* v. *United States, supra*). It might allow him to calculate the seriousness of the offense under investigation as one factor in justifying his response to it though this has never been a majority view (see dissent of Jackson, J., in *Brinegar, supra*) and it does permit him to take the risk of danger into consideration. (*Warden* v. *Hayden, supra.*) While the particular decision as to what facts constitutes probable cause in any given case may vary, the basic objective framework within which the decision is made never changes.

In permitting action upon probability rather than certainty, the standard recognizes the needs of law enforcement and meets that need. But in requiring probability rather than suspicion, the probable cause standard insures the right of a free people to be untroubled by officious, unwarranted meddling. While it is tolerable for a policeman to draw blood from the body of one as to whom he concludes, from the facts and circumstances, is a drunk driver, it would be intolerable to permit this same act upon any person driving from a tavern on New Year's eve. While it is tolerable for a policeman to arrest Entick for sedition if the facts and circumstances known to a reasonable man of prudence and caution warrant him in the belief that Entick has authored seditious literature, it is intolerable for him to arrest 47 persons who are suspected of uttering sedition because sedition has been published.

A good faith belief in one's suspicions cannot substitute for a calculation based upon the probability that one's

suspicions are well-founded. To trust good faith is to build the constitutional assurance of freedom from arbitrary official action upon sand. No witch was ever put to the rack except on the good faith of the churchly inquisitor who tightened the screw. Trevor-Roper, *Witches and Witchcraft,* ENCOUNTER, Vol. XXVIII, Nos. 5 and 6 (1967).

Probable cause has been the historic, traditional test of reasonableness not because it is some quaint, legal anachronism maintained only through the dead weight of precedent, but because it gives life to the principle that the right of personal liberty and the necessity of law enforcement can be made to co-exist together in a workable harmony. It remains to be shown whether the new standard created by section 180-a achieves this same kind of balance.

We submit that the statute cannot strike a reasonable balance: that it will destroy the right to privacy because, first, the standard it employs is vague and unworkable; second, the standard it employs is an invitation to evade the more stringent standard of probable cause; third, the statute cannot be confined to the apparently narrow purpose of police self-protection which its proponents say it was designed to achieve; and finally, that other, less drastic measures are available which will safeguard the police and which do not destroy the sense of dignity and freedom with which the law abiding majority walk the streets.

(6) Reasonable Suspicion Is Not a Viable Standard Upon Which to Authorize a Search.

The construction of reasonable suspicion, as given in *Peters, supra,* and its use in the various cases applying it,

leads to the conclusion that the only possible conduct not held reasonably suspect is the perfectly normal.

The standard is non-objective and vague and places primary reliance upon the intuitive assessment of the police officer. Because it is non-objective and vague, it cannot be applied by the courts to curtail arbitrary police action. Because it does not act as a check upon arbitrary police action, it does not strike a reasonable balance between the necessities of law enforcement and the citizen's right to privacy.

In *Peters*, 18 NY 2d at 245, the court stated:

> "By requiring the reasonable suspicion of a police officer, the statute incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity. *His evaluation* of the various factors involved insures a protective, as well as definitive, standard." (emphasis added)

In relying on *his* evaluation to protect *our* right of privacy, the standard makes the policeman the judge of our rights. This is the very evil the Fourth Amendment was adopted to prevent.

> "The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."
>
> *McDonald* v. *United States*, 335 U.S. 451, 455 (1948).

The standard is non-objective and vague because once the judicial focus is shifted from assessing the probability that a crime had been or is being committed to assessing the reasonableness of the officer's suspicion, then the court

need only assume that the police officer acted in good faith in order to sustain the search. What court can know whether a policeman reasonably suspected he was in danger of his life? What criteria can be employed to make such a determination? Either the policeman's own subjective assessment of the danger to his person is accepted, or the court must hold that the officer was overcautious in protecting himself.

From the decisions of the New York Court of Appeals it is highly unlikely that a court will find that an officer overreacted to his own perceived assessment of danger. In fact, in *People* v. *Rivera,* 14 N.Y. 2d at 446, the court conceded:

> "If we recognize the authority of the police to stop a person and inquire concerning unusual street events *we are required* to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman *may* be a bullet; *in any case* the exposure to danger *could* be very great. (emphasis added)

From this perspective, the answer to any question *could* be a bullet—even the most mild-mannered of men may be a potential killer—and given that assumption, what situations are left where no bullet may be expected and where no 'frisk' can be made?

In *Rivera,* the lateness of the hour and the high incidence of crime in the neighborhood justified the 'frisk.' The officer, who was in the company of two fellow officers, testified that while he was apprehensive because of these things, he was not in fear of being attacked.*

---

* Record on appeal, *People* v. *Rivera,* p. 32, (certiorari denied, 379 U.S. 978).

In *Pugach,* a search of the defendant's briefcase was justified even though the defendant was in a police car between two police officers. In *Peters,* the search was justified because it took place "in the narrow confines of a stairway", with a second suspect "still on the loose" and *although the officer was armed with his gun and had the suspect by the shirt collar,* "in such a situation the tables are easily turned." Here the search of Sibron was justified although the officer had observed him for eight hours without seeing any criminal conduct and where the officer unhesitatingly commanded the defendant to reach into his own pocket.

In *People* v. *Taggart, supra,* the fact that the suspect "was standing in the middle of a group of children that had just finished bowling" was sufficient justification for a full blown search since there had been an anonymous tip he was armed and "the presence of the suspect among a group of children is a particular circumstance suggesting that the occasion was not one in which a preliminary interrogation and perhaps a limited frisk before search was indicated, if the safety of the children or the police officer was to be respected."

In the cases where the reasonable suspicion formula is employed, the courts again and again feel themselves compelled to accept the officer's assessment of the danger inherent in the situation.

In *People* v. *Reason,* 52 Misc. 425, 429 (S. Ct. N.Y. Co., 1966), the court states:

> "It would be fatuous, in my opinion, to conclude that a police officer detaining a suspected thief would be

> foolish enough not to search the suspect for weapons. The notion that the thieves might be armed is not so far-fetched that it would be unreasonable, in my judgment, for an officer to search a person, suspected of burglary and larceny, for weapons."

In *State* v. *Terry,* 50 Ohio App 2d 122, 214 N.E. 2d 144, 120 (1966) No. 1161, O.T. 1967, the court, concluding that frisking must be allowed when a stop is permitted ("are we to allow him [the officer] the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet?"), *assumes* it will be done in good faith since,

> "police officers seem unanimous in stating that 'frisking' is done for self-protection and not as a mere evidentiary 'fishing expedition'."

Since the police officer, who had 39 years experience, thought the defendant was "casing a store with robbery in mind", it was also logical for the officer to assume that the defendant was armed and dangerous.

What situations are left where no search can be made?

> "Where a person's activities are perfectly normal, he is fully protected from any detention or search." *People* v. *Peters,* 18 NY 2d at 246.*

---

* This is echoed in *Williams* v. *State,* 222 N.E. 2d 397 (S.Ct. Ind., 1966):

> "The appellant argues that it is not against the law to have large sums of money and to carry them in such a fashion. It is possible that a person could carry money such as this without having committed a crime. However, if a person chooses to behave in so unconventional a manner, he has no absolute right to be free from reasonable 'inquiry'."

But what is "perfectly normal" under a standard which "incorporates the experienced police officer's intuitive knowledge and appraisal of the appearances of criminal activity" (*Peters,* at 245) and which relies upon the officer's "evaluation of the various factors involved [to] insure a protective, as well as definitive, standard." (*Peters* at 245).

As one commentator* has observed:

> "And Mr. Justice Jackson's distrust [of the policeman's judgment] was sound, for police judgment is not likely to be overly discriminating. Recent field studies by Skolnick, the American Bar Foundation, and many others have catalogued the many innocent events that are suspicious to a policeman. These studies and police training materials like Bristow's *Field Interrogation* point up the underlying principle of these judgments: anything out of the ordinary is suspicious. Because of the element of danger in his work, 'the policeman is generally a "suspicious person"; he must be suspicious of strangers, oddity, indeed any sort of change'. It is the nature of the policeman's situation that his conception of order . . . is . . . shaped by persistent suspicion . . . [A] young man may suggest the threat of violence to the policeman by his manner of walking or 'strutting'." **

---

* Schwartz, *"Stop and Frisk" in New York and Its Practice: A Case Study in the Judicial Abdication of Control Over the Police* (unpublished manuscript).

** For a more colloquial appraisal, see Pileggi, *The Long Palm of the Law,* ESQUIRE, April, 1967, p. 132:

> "Suspicion and distrust are basic police characteristics. Policemen are trained from their very first day to distrust everyone, to look for angles, suspect motives, see through tears, sadness

Perfectly normal is what appears perfectly normal to a policeman, so that if a person can make his conduct on the street conform to the policeman's conception of normal conduct, he is protected from a search. If he won't conform to the policeman's norm, or if he *can't* conform (because he is a negro in a white residential area* or a Puerto Rican walking in front of a bar in a high crime neighborhood**), then he is not protected from a search.

The only way to avoid being searched under the standard of reasonable suspicion is to be perfectly normal in the eyes of the policeman. Under this test, what is left of the Fourth Amendment right to privacy?

Since nothing is left, the statute must be declared unconstitutional.

(7) In Addition to Its Vagueness, the Reasonable Suspicion Standard Will Ultimately Destroy the Probable Cause Standard.

In the 16th century, Sir Thomas Gresham formulated a principle that has come to be known as Gresham's law. It was formulated in this manner: if two currencies are both legal tender and one is cheaper than the other, the cheap money drives out the dear.

---

and hysteria. Policemen are trained to see in every weeping widow a murderess, in every burgled merchant, an insurance thief, in every doctor robbed of narcotics, an addict."

* Field Surveys IV, *The Police and the Community*, A REPORT OF A RESEARCH STUDY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1966) (referred to hereafter as Field Surveys IV, Vol. I) Vol. I, page 142: "The Negro driving his family in an all white neighborhood and the racially mixed couples are pointed to as particular targets of the field interrogation."

** *People* v. *Rivera, supra.*

The analogy to creating a less stringent standard than probable cause and permitting both standards to justify a search for any evidence upon the person of the suspect is striking. If the police are permitted to search on a lesser standard, there is a real danger they will never govern themselves according to the greater standard. In order to insure that the 'protective' search on suspicion is not used as a device to evade the restrictions imposed on the traditional search, it should not be permitted at all.

Judge Fuld very cogently expressed this inherent potential for abuse in his dissenting opinion in *Peters*:

> "In authorizing such a search (on suspicion), section 180-a of the Code of Criminal Procedure represents more than a green light to abuse. As well illustrated by the present case, and even more graphically by *People* v. *Sibron* (infra, p. 603, also decided today), the statute is an outright invitation to evade the constitutional prohibition against unreasonable searches and to circumvent the exclusionary rule of *Mapp* v. *Ohio* (367 U.S. 643)." (18 N.Y. 2d at 249)

See also, *Task Force Report: The Police*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967), p. 186.

The very nature of a dual basis for admissibility of evidence carries in itself the real probability that the more stringent standard will never be utilized, just as the nature of a dual monetary standard creates the probability that no one will spend gold if he can buy the same commodity with devaluated paper money.

The statute is an invitation to abuse in two respects: first, it is amorphous and vague (*supra*, pp. 25-31) and

second, the end result of creating a dual standard will be to eliminate the search on probable cause.

Unless this Court is willing to abandon the time-proven balance that probable cause achieves between the right of privacy and the necessity of law enforcement, the reasonable suspicion standard must be declared unconstitutional.

(8) Section 180-a Cannot be Confined to the Purposes for Which It Was Enacted. Moreover Other Methods Are Available Whereby the Police May Protect Themselves But Which Will Safeguard the Police Without Destroying the Sense of Dignity and Freedom With Which the Law Abiding Majority Walk the Streets.

If this Court is ready to permit a protective search on a standard less than probable cause, we submit the only way the balance between the citizen's right of privacy and the officer's need for self-protection can be preserved, is to exclude all the evidence seized in the course of such a protective search. The reason for exclusion is that it is impossible to confine the protective search on reasonable suspicion to the single purpose for which it should be made unless the incentive to use it as a pretext for a general search of the person is removed.

Once the right to frisk is recognized, three possible situations exist after a suspect is stopped on less than probable cause:

(1) the suspect does something that causes the police officer instinctively to believe he is in danger, i.e. which gives him "reasonable suspicion," but which does not give him probable cause to believe he will be assaulted with a deadly weapon;

(2) the suspect does nothing, but because there is no way of knowing if he is dangerous, the officer frisks because "the answer to any question propounded may be a bullet";

(3) the suspect does nothing, but a frisk is made anyway because an arrest and search would not result in evidence that could be introduced in court.

The first situation is one where the exclusionary rule poses no problem to the officer—realistically speaking, he will frisk to protect his life no matter what a statute authorizes or what the court decisions say. His instinct for self-preservation will dictate his course of action. But the exclusionary rule does present a problem to the admissibility of the evidence, under the traditional test of admissibility, the evidence must be excluded.

The second situation presents a different kind of problem. Do we allow the existence of the exceptional situation to dictate the practice in the routine situation? The weight of the social-scientific exploration of this problem is against such an answer. While the answer to the question may be a bullet, knife or razor blade, and while it is important to protect the policeman, what is the effect on the citizen who is subjected to a,

"... check [of] the subject's neck and collar. A check should be made under the suspect's arm. Next a check should be made of the upper back. The lower back should also be checked.

A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, also should be checked. The inside thigh and crotch area should also

be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject . . . "

whenever he is stopped and questioned. Moynahan, POLICE SEARCHING PROCEDURES, 7 (1963).

The individual suffers an affront to his dignity, which causes a deterioration of the human spirit. As Justice Jackson stated in *Brinegar* v. *United States*, 338 U.S. at 180-181 (dissenting opinion):

"Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among the people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons, and possessions are subject at any hour to unheralded search and seizure by the police."

Moreover, the routine use of the frisk has the effect of breaking down police-community rapport. "A community's attitude toward the police is influenced most by the action of individual officers on the street". *Task Force Report: The Police, supra* at 178. What attitude other than hostility and hate can be expected if every stop is accompanied by the kind of laying on of hands that a frisk entails? Should this practice be encouraged by admitting the evidence discovered by the frisk? Or should it be discouraged by excluding the evidence?

The third situation is the logical extension of the second. If the answer to every question may be a bullet, and if a

frisk is therefore permitted in any situation where a stop is made (*People* v. *Rivera, supra*), and if the evidence is admissible, then how can a court ever determine when the frisk is being used as a subterfuge? No policeman is going to admit that he frisked simply because he couldn't search and not because the answer to his question might have been a bullet, and no defense attorney, no matter how skilled in the art of cross-examination, will ever be able to establish this. And what court, no matter how slight the suspicion, informed by hindsight and judging after the event would be willing to say that the suspicion was insufficient or that the suspicion was unobjective.

The evidence must be suppressed in all the situations posed in order to prevent the exceptional reason for finding the evidence admissible (the officer's good faith search for self protection) from becoming the general test of admissibility. This Court cannot approve the practice wholesale merely because the policeman will do it anyway when he instinctively feels it is necessary.

This Court has consistently warned against grafting exceptions on constitutional rights. The attitude of this Court regarding such exceptions was perhaps best expressed by Mr. Justice Bradley:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."
>
> *Boyd* v. *United States*, 116 U.S. at 635.

But what about the first situation: if the police are going to frisk to protect themselves when they instinctively feel it is necessary, must the courts be put in the awkward position of excluding the evidence and thereby saying to the individual officer, you acted illegally even though your instinct for self-preservation told you you were acting justifiably.

This dilemma is not a real one because it stems from a misconception of the nature and purpose of the exclusionary rule. The exclusionary rule was not designed to punish the blunder of the individual constable, but rather as the means to obtain broad executive compliance with the Fourth Amendment restraint on unreasonable official action.* The danger to the right of privacy stems not from the isolated act of an individual policeman, but from the policy of his superiors. Landynski, at 123, 184-5. The exclusionary rule is applied because in order to make an effective record of criminal convictions, law enforcement agencies must avoid conduct which imperils successful prosecution (Landynski, at 85)** and also because no other

---

* As pointed out in Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation, District of Columbia, 1962, page 52 (hereafter cited as the Horsky Report); the existence of the Judges Rules in England, even though they are violated on occasion by the police, show that the authorities believe crime can be controlled without resorting to illegality, even though the individual constable, on occasion, does not. See also Landynski, at 78.

** The proof of this in the related area of illegal confession is contained in Field Surveys IV, Vol. I, page 134:

> "It is noteworthy that nowhere in the findings of this study were allegations of the falsification of evidence or forcible extraction of admissions and confessions advanced by any person interviewed, nor were they otherwise suggested by observation and investigation. *It can be assumed, however, that the high judicial standards which prevail today* would make the exer-

method is available for securing broad executive compliance with Fourth Amendment restrictions upon criminal law enforcement. *Mapp* v. *Ohio,* 367 U.S. at 654. By excluding the evidence in the first situation in order to prevent the second and third situations from developing, the court is not branding the individual officer an outlaw, but is insuring that a defensive measure will not be converted into a widespread, systematic officially sanctioned invasion of the right to privacy, and is further, setting the positive standards to which heads of law enforcement agencies will conform the practices of their men.*

Punishment of individual acts of misconduct should be left to supervisory agencies within the community, whether they be review boards or ombudsmen or even civil courts which sit to determine whether monetary judgments for false arrests or civil rights violations should be awarded against the individual policeman. But the decision to admit or exclude evidence cannot be employed to vindicate the good faith of the individual policeman** when to utilize it for this end entails the grave probability that all judicial control over unreasonable invasions of the right of privacy will be forfeited.

---

cise of the unconstitutional acts meaningless in the accomplishment of the police purpose. Accordingly it is not expected that any law enforcement agency would subscribe to technical practices which may have been more common in earlier times."

* "Begrudging adherence to the letter of due process [by the policeman] may have a different social effect than willing, wholehearted acceptance. Much of the latter is dependent, of course, upon the top leadership of the Department. These high-ranking officials set the administrative and organizational tone and style with which the police mission is accomplished." Field Surveys IV, Vol. 1, p. 136.

** "This officer is deserving of our highest praise", *People* v. *Peters,* 18 N.Y. 2d at 246.

We have no qualms about stating that the officer should be free from civil liability or administrative reprimand when he has acted in good faith out of a sense of self-protection. But we do challenge the good faith of a statute which because of its standard, nullifies the balance between privacy and law enforcement which the Constitution demands.

The policeman can achieve his need for self-protection, which is the professed reason for 180-a(2), without endangering the Fourth Amendment right to privacy. A state could allow him to assert his good faith, reasonable intuitive suspicion as a defense in a civil or administrative proceeding. But we feel we have demonstrated above that to allow evidence seized on less than probable cause even where the officer makes the search in good faith, is inevitably to abrogate the Fourth Amendment right to privacy.

In sum, reasonableness has always meant probable cause where a search was authorized. Probable cause has survived the test of time because it can accommodate the day to day needs of law enforcement while protecting the right of privacy. Reasonable suspicion is a standard less than probable cause. It does not strike a balance because it is vague, intuitive and subjective. It cannot co-exist with probable cause, since the existence of a lesser standard authorizing the same conduct as a stricter standard inexorably results in the death of the stricter standard. The limited purpose of protecting the officer who searches in the heartfelt need of self-protection can be accomplished by other, less risk-laden, alternatives than by a statute authorizing the introduction into evidence of all items seized in the course of a self-protective search. For all these reasons, section 180-a is unconstitutional.

POINT II

Section 180-a Is Unconstitutional on Its Face Because It Authorizes an Unreasonable Seizure of the Person.

(1) CONSTRUCTION OF THE STATUTE AS TO THE MEANING OF THE WORDS, 'STOP' AND 'DEMAND',

The literal words of Section 180-a(1) are:

> "A police officer may stop any person abroad in a public place * * * and may demand of him his name, address and an explanation of his actions."

In *People* v. *Peters, supra,* at 241, the word "stop" was construed to authorize the following conduct: "Officer Lasky apprehended defendant." The "apprehending" was effected in this manner: Lasky pointed his gun at the defendant and held him by the shirt collar. Record on Appeal, pp. 20-21.

While doing so, Lasky "asked him [the defendant] what he was doing in the building. Defendant claimed to be looking for a girlfriend but refused to identify her because she was a married woman. Unimpressed with Defendant's apparent chivalry, Lasky brought him to the fourth floor * * *." 18 NY 2d at 241. This sequence of events was characterized by the Court of Appeals as "the limited intrusion of asking one for an explanation of his actions." 18 NY 2d at 243.

The New York Court of Appeals in *People* v. *Taggart, supra,* characterized the officer's action in the instant case as "the temporary detention of a suspect." —— NY 2d ——. This temporary detention consisted of the following: the uniformed officer interrupted the appellant's

meal in a restaurant (R. 8) asked him to accompany him outside (R. 16) and when appellant complied (R. 19), said to him without preliminary questioning "you know what I am looking for" (R. 18). The appellant, in response, reached into his pocket.

In *People* v. *Taggart, supra,* the officer "* * * took him [Taggart] by the arm and put him against the wall." This action was characterized as "the 'detention' involved in the instant case." —— NY 2d at ——.

The components which emerge from this are the following: In all three cases an officer of the law restrained the liberty of locomotion of the individual or his ability to do what he wished to do.

In two cases the restraint was effected by means of force, specifically, laying on of hands on the body and the use of a gun.

In the third case, *Sibron,* the interruption of the person's activity (sitting in a restaurant eating pie) and the restriction on his ability to do what he wished, i.e. to remain in the restaurant, was effected by "overcom(ing) (him) by a show of authority" (R. 19).

In *Peters,* the defendant was made to justify his conduct verbally, and the explanation was rejected.

In this case, the officer demanded that the appellant incriminate himself, which he did, not verbally, but by conduct.

These kinds of restrictions are not merely "something of an invasion of privacy" (*Peters,* at 245, quoting *Rivera* at 446) they are gross invasions of privacy. This is not a mere 'stopping to inquire'; it is a forcible restraint for the purpose of compelling the person to account for him-

self. This type of conduct, as we will demonstrate below, has traditionally been treated as a seizure of the person, if not as an arrest, and has been prohibited on a standard less than probable cause.

(2) The Statute Has Been Construed to Authorize a Seizure of the Person. Since This Is a Significant Restraint on Liberty or Because it is Tantamount to an Arrest, It Is Prohibited by the Fourth Amendment, Except Upon Probable Cause.

The proponents of the statute concede that the Constitution prohibits arrests on less than probable cause, and the courts upholding the constitutionality of the statute acknowledge this. *People* v. *Peters, supra; People* v. *Rivera, supra; People* v. *Taggart, supra.* That they are correct needs no citation of authority.

Before the New York Court of Appeals interpreted the statute in *Peters,* this case, and *Taggart,* its advocates argued that the stop authorized by the statute was less than an arrest, and that no probable cause was therefore necessary. They further argued that effective law enforcement demanded the police be given this power, and concluded that since the invasion was so slight and the necessity so compelling, the conduct authorized was reasonable, and, since it was reasonable it was not prohibited by the Fourth Amendment.

The regulations* issued when the statute was enacted lent credence to this argument. With respect to the stop they provided:

---

* New York State Combined Council of Law Enforcement Officials, Memorandum on the "Stop & Frisk" Laws, reprinted in 151 N.Y.L.J., No. 108 (1964), (hereafter referred to as Combined Council Memorandum).

"If the suspect refuses to stop, the officer may use reasonable force, but only by use of his body, arms, and legs. He may not make use of a weapon or nightstick in any fashion."

With respect to the questioning, the regulations provided:

"Should the suspect refuse to answer the officer's questions, the officer cannot compel an answer and should not attempt to do so. The subject's refusal to answer shall not be considered as an element by the officer in determining whether or not there is a basis for an arrest.

"In ascertaining his name from the suspect, the officer may request to see verification of his identity, but a person shall not be compelled to produce such verification.

"If the suspect does answer, and his answers appear to be false or unsatisfactory, the officer may question further. Answers of this nature may serve as an element in determining whether a basis for arrest exists (but if an officer determines that an answer is 'unsatisfactory' and relies upon this, in part, to sustain his arrest, he should be able to explain with particularity the manner in which it is 'unsatisfactory'.)"

The statute, on its face without the cases interpreting it, coupled with the guidelines, would pose a difficult case for advocating unconstitutionality of the 'stop' provision. But after the cases construing subdivision (1), this difficulty has evaporated. The court of appeals has sanc-

tioned the use of force, including weapons, to effect a stop, and has sanctioned the compelled questioning of a suspect, rather than the mere request for information. This is more than a petty inconvenience, it is a gross invasion of the right of privacy protected by the Fourth Amendment and it poses a grave threat to the constitutional privilege against self-incrimination protected by the Fifth Amendment.*

Forcible restraint of movement coupled with compulsion to answer are significant restraints on liberty and are the kind of "seizures of the person" which the Fourth Amendment was framed to prevent. Moreover, the point at which probable cause is required has always been the point at which a significant restriction on liberty of movement was made.

It is apparent from the decisions in *Rios* v. *United States,* 364 U.S. 253 (1960); *Henry* v. *United States, supra,* and *Brinegar* v. *United States, supra,* that the type of seizures of the person the New York Court of Appeals has approved must be made upon probable cause.

In *Rios,* the facts were as follows: A cab had stopped at a red light. The police officer who walked up to it had no probable cause to arrest its occupants. Three different versions of what happened before the contraband was seen by the officers were given. In the original arrest report, the police stated the defendant dropped the contraband after one of the officers opened the door. At the suppression hearing, one officer testified the defendant dropped the contraband before the officer opened the door. At trial, the taxi driver testified that one of the officers drew his

* See, Horsky Report, at 45-46.

revolver and took hold of defendant's arm while he was still in the cab. The district court judge did not hear the cab driver's testimony.

This Court stated that the seizure of the contraband could only be justified if it was within one of the narrow exceptions to the warrant requirement, *i.e.* if it were incident to a lawful arrest. The critical question was then, when was the arrest made?

If the officers did nothing other than approach an already stationary taxi, there was no arrest. But if the taxi cab driver's story were accurate, *i.e.* if the officer drew his revolver and took hold of defendant's arm, then there was an arrest on less than probable cause and anything occurring after it could not be used as a predicate for probable cause. Because there was such an acute conflict in testimony, and because the cab driver's testimony was not before the district court, this Court remanded the case.

What emerges from *Rios* is that a mere non-forcible act on the part of the officer which does not restrain the person's liberty of movement is not an arrest, especially where the officer was able to inquire without arresting the defendant's liberty of movement. If during this non-forcible, non-restricting inquiry, incriminating evidence was seen, then it could be used to establish probable cause for a subsequent, forcible, restrictive curtailment of liberty. But on the other hand, if the initial act was forcible and restrictive and did therefore arrest the defendant's liberty, what was observed subsequently could not be used to justify the prior curtailment of liberty. The remand was for the purpose of resolving the facts, not the law.

The *Rios* decision explicitly recognizes the validity of the holding in *Henry* v. *United States, supra,* decided the previous year.

In *Henry* the agents waved a moving vehicle to a stop. At this point, no probable cause existed. After the stop was thus effected the defendants made statements which would have given the agents probable cause if they could utilize these statements. This Court held that waving a moving vehicle to a stop constituted an arrest, stating (361 U.S. at 103):

> "When the officers interrupted the two men, and *restricted their liberty of movement,* the arrest, for the purpose of this case, was complete" (emphasis added).

In *Henry* this Court denounced restrictions of liberty based on suspicion (361 U.S. at 104):

> "Under our system, suspicion is not enough for an officer to lay hands on a citizen."

The decisions in *Henry* and *Rios* are a logical outgrowth of this Court's decision in *Brinegar, supra.*

In that case, the federal agents gave chase to defendant's car and "crowded his car to the side of the road." 338 U.S. at 163. The district court found there was no probable cause before the car was stopped, but held that incriminating statements made after the stop gave the officers probable cause to search and arrest. The majority of this Court held there was probable cause before the car was forced off the road. Only Mr. Justice Burton, who concurred in a separate opinion, was willing to hold that no probable cause needed to exist before the forcible stop-

ping. Thus in *Brinegar,* the majority felt that forcing a car off the road was such a significant restriction of liberty that probable cause must exist prior to making such a restriction.*

There are lower court decisions which, on the surface, appear to sanction a stop and detention on less than probable cause. In actuality, they do not support permitting the kind of conduct the New York Court of Appeals has held the statute authorizes. Upon analysis, the stops they countenance were non-forcible and non-compelled and were not for the purpose of seizing evidence. See, *United States* v. *Bonanno,* 180 F. Supp. 71 (SDNY, 1960); rev'd on other grounds, 285 F. 2d 408 (2nd Cir., 1961); *United States* v. *Vita,* 294 F. 2d 524 (2nd Cir., 1961), cert. den. 369 U.S. 823 and *United States* v. *Thomas,* 250 F. Supp. 771 (SDNY, 1966). To the extent that there may be anything in these cases leading to the conclusion that a forcible, restrictive curtailment of the citizen's liberty of movement is proper absent probable cause, then those intimations are in conflict with the decisions of this Court and with the purpose of the Fourth Amendment.

We assert that grabbing a man by the shirt collar at gun point, forcing a man to leave a restaurant, or grabbing his arm and putting him against a wall is a more significant

---

* To the same effect: *Carroll* v. *U.S., supra* at 177; *Long* v. *Ansell,* 69 F. 2d 386, 389 (D.C. Cir., 1934); *U.S.* v. *Scott,* 149 F. Supp. 837 (D.C. Cir., 1957); *U.S.* v. *Mitchell,* 179 F. Supp, 636 (D.C. Cir., 1959); *U.S.* v. *Viale,* 312 F. 2d 595, 601 (2nd Cir., 1963); *Coleman* v. *U.S.,* 295 F. 2d 555, 563-564 (D.C. Cir., 1961), cert. den. 369 U.S. 813 (1962); *Kelley* v. *U.S.,* 298 F. 2d 310 (D.C. Cir., 1961), where the facts are very similar to the instant appeal. See generally the Horsky Report, especially pages 25-33, for a comprehensive analysis of the cases.

"restriction of the liberty of movement" (*Henry, supra*) than is the waving of a car to a stop. We vigorously assert that the Fourth Amendment prohibits these kinds of restraint on a standard less than probable cause. To permit such restraints on less than probable cause means that the police, in their discretion, are given control over "the right of every individual to the possession and control of his own person." (*Union Pacific Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891).) This was the evil most feared by the framers of the Fourth Amendment (See Horsky Report, at 42-44); and the very essence of the Fourth Amendment is that it cannot be permitted to occur.

Since the statute has been construed to authorize a forcible seizure of the person on a standard less than probable cause, it must be declared unconstitutional.

(3) The Standard Employed by the Statute Results in Arbitrary Seizures of the Person.

> "No right is held more sacred, or is more carefully guarded, by common law, than is the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by a clear and unquestionable authority of the law."
>
> *Union Pacific Ry. Co.* v. *Botsford, supra* at 251.

The ability of our citizenry to move freely about the streets of its cities is an integral component of its dignity and self-respect. No man should have to fear he will be forcibly accosted by a policeman when he walks out of his home. But this statute makes that fear a very real one.

The reasonable suspicion standard employed by the statute to determine when a 'stop' can be made (as we have argued with regard to a 'search') is vague, intuitive and subjective, depending in the last analysis upon the norms of the police officer. It prevents interferences with the right of privacy only where one's conduct is perfectly normal. It also must be recognized that in dealing with the 'stop', we are dealing with a practice over which the courts often cannot apply sanctions, because often the courts are never involved with the practice at all. See Horsky Report, at 69. The combination of these two factors—vagueness of the standard and lack of case-by-case judicial control—serve to make the 'stop' even more widespread a practice than the search. The proof of this assertion is spread over the pages of Field Surveys prepared and submitted to the President's Commission on Law Enforcement and Administration of Justice. Over and over again there are examples of the kind of situations in which a policeman has reasonably suspected that an individual must be 'stopped';

> "The * * * Negro juvenile * * * is picked up if he has a beard, picked up if he has the wrong clothing, picked up if he's a 'beatnik', and picked up if he's out after curfew hours without a chance to explain or give a reason; if he has a motorcycle, he is likely to be stopped. * * *"
>
> Field Surveys IV, Vol. I, p. 89

* * * * *

> "... like if a police pass you, and he be starin' at you, and you stare back, that's what gives way for them to say that, you know, you give them a dirty look. But this happen to me all the time, that maybe standin' like I'm up to something, so I stare back, they turn

on the light in back, drive their cars around, drive over there, 'c'mere. Stand up here. What you got on you?' Pattin' you all down—for what, I don't know. I've 'looked suspicious', you know, the way I've walked, swing my arms, stuff like that." Field Surveys IV, Vol. I, p. 98.

* * * * *

"When you have a bike, they just pull you over for no reason. So many little things . . . you have to have a horn, you have to have a baffle, your handlebars have to be so high and no higher." Field Surveys IV, Vol. I, p. 95.

* * * * *

"I've got a case right in my office right now that came in when it was thrown out the other day. A police officer stopped a Negro who was six foot four, and he was wearing a beard. He was driving his car down to the laundromat to do his laundry after he got off work. The officer stopped him; he asked them what for. One said, 'Well, I wanted to see how long your beard was. Let's see your drivers license. There was no traffic offense, no mechanical violation. The policeman looks at his drivers license, and says 'I'm going to call in and see if there is anything out for you."' He calls in and there is a warrant with the same name, a traffic warrant . . . failure to appear. They go to the Marshall's office, this guy is begging them to check the license number on that other citation, check the description. He has to go to the Marshall's office where this information is kept, refuses to check it, takes him in, makes him bail out. Comes to court they find out that they were looking for a five foot six, 140

pound, blond, blue-eyed Caucasian." Field Surveys, Vol. I, p. 67.

See also Horsky Report, Appendix D, for situations in which 'reasonable suspicion' led to arrests for investigation. Out of the 26 cases utilized to present a random selection of arrest for investigation reports, only one resulted in the individual's being charged with a crime.

Because the statute permits forcible or compelled "stops" to be made upon a vague standard which does not curtail the arbitrary exercise of the practice, it must be declared *unconstitutional.*

(4) THE 'STOP' IN THE DISCRETION OF THE POLICE OFFICER IS NOT AN EFFECTIVE WEAPON AGAINST CRIME, AND ITS COST IS GREATER THAN ITS EFFICIENCY.

The conclusion is inescapable that the 'stop' is a widespread practice, even without the addition of an official stamp of approval by legislatures and courts. However the proponents of this statute maintain that the 'stop' is absolutely necessary as a crime preventive tool and this necessity outweighs the "petty inconvenience" and "slight infringement of liberty" the practice entails.

How effective is the 'stop' as a crime preventive tool?

The proponents advance various reasons why it is not only effective but absolutely essential. First, it is said to prevent crime. But the mere presence of an officer in uniform can also achieve the same result. A forcible 'stop' achieved by use of a gun or by the laying on of hands is unnecessary. Second, it is claimed that the 'stop' enables the policeman to get information that he could not otherwise elicit. This can also be done without holding a man

by the shirt collar and pointing a gun at his chest. In fact, the literature in the field suggests that a courteous approach to the individual yields more information than does an abrupt show of authority. See Horsky Report, pages 62-63; Field Surveys IV, Vol. I, pp. 142-145; and Field Surveys V, p. 359.* A possible third justification, which has been advanced for the arrest for investigation is not even applicable here. The detention is said to keep a suspect out of circulation, and for the period of time he is detained he will not commit a crime. See Horsky Report, page 63. Since the 'stop' cannot be used as the first step in an arrest for investigation, this justification is nonexistent. A fourth justification for permitting the 'stop' is that it gives the suspect a chance to exculpate himself and avoid the stigma of an arrest and detention in jail. But where there is no probable cause to arrest for a crime and detain a man in jail on a criminal charge, we will assume that no arrest will be made and that no stigma will be forthcoming. Moreover, the possibility of exculpation exists where a man is approached and questioned courteously so that it is hard to see why force or compulsion must be employed to effect a 'stop' which is designed to permit exculpation. See also *Miranda* v. *Arizona, supra,* at 482.

In this case and in the *Peters* case, it is difficult to see what legitimate objects were achieved by the forcible 'stop' that could not have been accomplished without resort to force or compulsion.

---

* A National Survey of Police & Community Relations, a Report Submitted to the President's Commission on Law Enforcement & Administration of Justice (1967).

In *Peters,* the officer possibly prevented a burglary from occurring. But his mere presence in the hallway, coupled with an announcement that he was a police officer, could have done the same. It was unnecessary for him to grab the suspect's shirt collar and point his gun at his chest in order to prevent an inchoate crime. The only gain achieved was the recovery of burglar's tools, which, as in this case is merely evidence of a possessory crime. In both cases, the only gain to law enforcement produced by the forcible or compelled stop was the uncovering of evidence that could not be uncovered if this Court's decision in *Mapp* v. *Ohio,* was honored.*

Even assuming the forcible, compelled stop is a major weapon in the policeman's arsenal against crime, we submit that the price paid in community alienation is greater than the benefits accruing from its deployment.

While the police cannot accurately calculate the efficiency of the stop as a weapon against crime,** the studies in the area of police-community relations have shown by empirical methods, the great price paid in community alienation that its use brings about.

---

* See Field Surveys III, Studies in Crime & Law Enforcement in Major Metropolitan Areas (1967), Vol. 2, pages 67-68, stating that in order to define who is a suspect, the policeman obtain information not only by questioning. "Where, in the judgment of the officer, there is reason to believe he may be confronting an offender or 'suspect' or a 'suspicious' person who has committed or is committing a crime, he traditionally has utilized other means such as stopping and searching a person and his property in a public place or undertaking a search of the person's property on being called to or entering a private place." This recognizes that the search incident to a "stop" is traditionally not necessarily a means of self protection, but a means of obtaining incriminating evidence.

** Remmington, *The Law Relating to "On the Street" Detention Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General* in Soule, POLICE POWER AND INDIVIDUAL FREEDOM, 11, 15-18 (1962).

The San Diego survey states:

> "One of the primary areas of conflict between the police and the ethnic minorities in San Diego appears to involve field interrogations. * * * The statements of both Negro citizens and Negro policemen verify the fact that the field interrogations represent a major source of conflict and irritation between the Police Department and ethnic minority groups."
>
> Field Surveys IV, Vol. I p. 127

For a complete evaluation of the practice as seen by the police and as viewed by the community see Field Surveys IV, Vol. I, pp. 127-129; *Task Force Report: The Police* pp. 103, 147, 157, 178 and 184 and Field Surveys, Vol. V.

Where the field interrogation is coupled with a search, the price paid in community alienation is even greater. The Philadelphia survey (Field Surveys IV, Vol. 2, p. 106) quotes an attorney as stating that the worst form of police misconduct in the ghetto area is the "illegal and/or unnecessary" search and seizure. The comments of those subjected to the search are revealing:

> "Another youth, in discussing field interrogations, states that he dislikes the shakedown part of it most: 'Man, I just don't dig this pulling up your shirt to see what's under there, tapping you up and down the sleeves and legs and arms."
>
> Field Surveys IV, Vol. I, page 105

See also *Task Force Report: The Police*, pp. 185-187.

It is also significant to note that in *Patterns of Behaviour in Police and Citizen Transactions,* (Field Surveys III Vol. 2, page 102), the authors, in discussing the use of force or compulsion to effect a 'stop' conclude:

> "* * * *more persons objected to being constrained during the interrogation than to the interrogation itself.*"
> (emphasis in the original)

The conclusion seems inescapable that the asserted gain to law enforcement from use of the 'stop' and most particularly from the use of the forcible, compelled stop coupled with a search, is heavily outweighed by the toll the practice exacts in community-police friction and hostility.

A hostile community does not cooperate with its police force, either in supplying information or tips or in making the police job easier in other ways, and thus a useful tool of law enforcement is lost.* Moreover the point often missed by the advocates of such measures as this is that "law and order are the consequence of domestic tranquility, and not the other way 'round."**

The focal point of community resentment is, unfortunately, the police. However, the one bright picture which

---

* "The underlying assumption for the field interrogation practice is to secure information! However, harassed people are generally not communicative or cooperative." Field Surveys, Vol. V, p. 361.

** "Blow-up in the Cities," *The New Republic,* Aug. 5, 1967, at p. 6. See also Field Surveys, Vol. V, pp. 361-362:

> "Implicitly, the foregoing indicates that the successful accomplishment of American police goals are to be found elsewhere. It is suggested that this 'elsewhere' may be the community. The most effective deterrent to criminal activity may be, in the final analysis, a *community enterprise.* Community enterprise is more closely akin to a democratic system of government than is repressive police activity."

emerges from the various crime commissions field studies is that the experts in the field recognize this and are attempting to persuade the police to solve this problem*. The answer that we feel emerges is so simple yet so profound that it is difficult to state in any but biblical language: 'Violence begets violence' ** and 'a gentle answer turneth away wrath'. Furthermore, properly conceived and understood police and community relations is essentially *preventative* in its character but in an even more positive sense, its ultimate objective is in better law enforcement for the common good, and "better, in this sense, means more than simply more efficient." Field Surveys, Vol. V, p. 377.

(5) Illegal Seizures of the Person Must Result in the Exclusion of Any Evidence Resulting From the Initial Illegality.

Once it is recognized that the seizure of the person on less than probable cause is illegal, then it follows that any evidence resulting directly from the initial illegality must be suppressed,† as it is essential to suppress the evidence

---

* "The police and segments of some communities have become convinced that they are adversaries. As a result, the staff visualizes two distinct alternative possibilities for the police: (1) They can refuse to initiate any changes and be prepared to tolerate decreasing public respect and suffer increased violence; or (2) They can admit some fallibility, welcome criticism, compromise a little, and initiate objectively considered changes in an effort to enhance public support and avoid violence. In the first instance, it is likely that the disrespect and violence will result; in the second the staff can offer only an educated prediction that conditions will improve." Field Surveys IV, Vol. I, p. 256.

** See generally Hayden, "The Occupation of Newark", *New York Review of Books*, Aug. 24, 1967.

† *Wong Sun* v. *United States, supra; McDonald* v. *United States, supra; Rios* v. *United States, supra; Henry* v. *United States, supra; Ker* v. *California, supra* and *Miller* v. *United States*, 357 U.S. 301 (1958).

in order, at least, to remove some of the incentive for the widespread use of illegal stops.

The law is clear that where there is an initial illegal action, whether it be an arrest, a trespass, or a failure to knock, the state cannot benefit from the officer's wrongful act. Consequently, all evidence flowing from the initial illegality either verbal or otherwise, is tainted and must be suppressed.*

Suppression of all evidence resulting from a 'stop' as defined by the New York Court of Appeals is absolutely essential if the practice is to be curtailed. The function of the exclusionary rule in the case of a 'search' is to obtain broad executive compliance with the Constitution. The taint-trespass-estoppel rule serves the same purpose in cases involving 'stops'.

Moreover no matter how prevelant the 'stop' on suspicion is at the present time, a decision of this Court condemning it as unconstitutional and applying sanctions against its use will be respected and law enforcement agencies will tailor their practices accordingly.** But even if this were not to occur, the citizen on the street must be made to feel that the courts are protecting his right to walk in dignity.

Forty years ago, Justice Brandeis summed up the essence of the Fourth Amendment:

---

* Without such a doctrine, there could be no such concept as a search incident to a lawful arrest. If one could use the evidence flowing from an initial illegal seizure to establish probable cause for an arrest, then the legal arrest would become an appendage of the illegal search.

** See footnote, pages 37-38, *supra*.

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."
>
> *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

The pressures to short-cut traditional guarantees of individual freedom are always present. But the ultimate character of a society is set as the day-to-day choice is made between efficiency and liberty. Unless this statute is held unconstitutional in its entirety, the 'most valued and comprehensive of rights' could end up just another pretty phrase on the pages of history.

POINT III

Assuming the Statute Is Not Unconstitutional on Its Face, It Is Unconstitutional by Reason of Its Application to This Case.

Even assuming, for purposes of argument, that Section 180-a of the Code of Criminal Procedure is not unconstitutional, because on its face and as construed by the New York Court of Appeals, it does not authorize an unreasonable search or an unreasonable seizure of the person, it is unconstitutional because its application to this case has resulted in permitting an unreasonable interference with the right of privacy. See *Cox* v. *Louisiana,* 379 U.S. 536 and 559 (1965) and *Shuttlesworth* v. *Birmingham,* 382 U.S. 87 (1965).

The instant case is barren of any facts indicating that appellant had committed or was about to commit a crime. During the entire eight-hour period during which the officer observed appellant (whom he had never seen before), neither narcotics nor money was passed; nor did the officer overhear any conversation. Stripped to its bare essentials, appellant, while outside the restaurant, was conversing with drug addicts, and once inside the restaurant, was sitting at a table eating pie and drinking coffee in the company of three addicts.* This statute could obviously not be designed to prevent appellant from conversing with undesirables. Appellant's behaviour was not unusual.

* The officer testified that he knew the persons with whom appellant spoke were "addicts" because over the preceding several months each one of the persons had separately volunteered to the officer the information that they were addicts. The officer could recall the names of none of these "known addicts" (R. 14-15).

In a city like New York, such meetings must be rather common, so that even if appellant were a suspected addict or seller, his mere talking to known drug addicts hardly constitutes reasonable suspicion that he had committed, was committing, or was about to commit a crime. *Beck* v. *Ohio, supra; United States* v. *DiRe,* 332 U.S. 581 (1948).

With respect to the 'stop', it is submitted that the officer's conduct exceeded that purportedly authorized by the statute on its face. First, at the time of the 'stop', the officer did not have the requisite reasonable suspicion to believe a crime was being or was about to be committed, and secondly, instead of asking for the kind of information the statute purports to authorize (appellant's name, address and an explanation of his actions), the officer compelled appellant to incriminate himself. The initial 'stop' was, therefore, unjustifiable even within the purported framework of the statute. The statute must be declared unconstitutional because, in its application, it infringes upon a constitutionally protected area by permitting an unreasonable seizure of the person and all direct products of that initial illegality must be suppressed. See *supra,* Point II, pp. 56-57.

Additionally, irrespective of whether the 'stop' was justified, under no circumstances was the officer warranted in conducting a full-blown search of appellant. Section 180-a authorizes an officer to search only when he "reasonably suspects that he is in danger of life or limb". We submit that not only is the record devoid of any proof that could sustain a finding that the officer searched because he reasonably feared danger to his person, but on the contrary, that a fair reading of the record indicates that the officer was seeking narcotics when he made the search.

The officer possessed no information that appellant was dangerous. In fact, during the entire period that appellant was under observation, the officer did not observe any weapon or any bulges.

When the officer confronted appellant inside the restaurant and asked him to accompany him outside, appellant offered no resistance. He complied to the letter with the officer's demand. On the street, the officer stated to him: "You know what I am looking for" (R. 18). Appellant then reached with his left hand into his left jacket pocket, and the officer immediately placed his hand in the same pocket and "saw in his [appellant's] hand and in his pocket he was ready to grab this cellophane—actually it was a metal tin-foil wrapper" (R. 17). At that point the officer prevented the appellant from reaching the cellophane or foil packet, which he thought appellant was attempting to throw away, and seized it himself (R. 17).

From the moment appellant was compelled to leave the restaurant until he was searched outside, his behavior was consistently one of submissiveness to and strict compliance with the officer's demands. The trial court specifically recognized this, stating:

> "However, here is a police officer, known by the defendant to be a police officer. The police officer advances toward the defendant and says 'You know what I am looking for'. The defendant—may it not be so—was overcome or over-awed by a show of authority of a police officer who asks him point blank or says to him point blank, 'I am looking for contraband'. The defendant reaches into his pocket and is about to take it out, the facts are just as consistent with the inter-

pretation he is about to take it out and hand it to the police officer [rather than throw it on the street]. The police officer intercepted him" (R. 19).

The only reference to a possible fear of danger was the officer's statement that appellant 'might have been reaching for a weapon' (R. 17). This remark does not conclusively dispose of the matter. The reasonableness of the suspicion must be an objective inference from the facts, and cannot depend solely on the policeman's own testimony. *People* v. *Peters,* 18 N.Y. 2d at 245, 246; Combined Council Memorandum, *supra,* and 78 Harv. L. Rev. 474 [1964]). Moreover the very statement itself is suspect since the officer had previously stated he put his hand in appellant's pocket to keep appellant from attempting to throw the contraband away (R. 16-17) and in the complaint swore that appellant took the narcotics out as the officer approached (R. 1).

Neither can an inference of danger be drawn from the fact that appellant mumbled something before complying with the officer's demand. In this context the mumbling is more indicative of resignation than some sinister purpose.

As one commentator points out,* had the officer felt that appellant might be dangerous, he never would have permitted appellant the luxury of reaching into his pocket:

"* * * Indeed, if the officer thought that he was in any danger, would he not have made the frisk himself, as was done in *Rivera*? Surely, he would not have ordered the "dangerous" suspect to hand over some-

* Schwartz, *supra* footnote, p. 80.

> thing which was not in the suspect's hand at the time, therefore *requiring* him to go into his pockets and obtain access to whatever weapons might be there. A bona fide frisk for safety involves keeping the suspect's hands *out* of his pockets, not *in* them. Indeed, the officer himself described his understanding of Sibron's actions as "reaching in his pocket to throw it out."

It is submitted that in the total context of this record it was unreasonable and even unrealistic for the officer to suspect that appellant was reaching for a weapon.

Judge Keating, speaking for the majority in *People* v. *Peters*, 18 N.Y. 2d at 245 stated:

> "For in the last analysis the constitutionality of the statute is determined not so much by the language employed as by the conduct it authorizes."

In this case the conduct which the New York Court of Appeals held the statute to authorize is *carte blanche* for the arbitrary and high-handed stopping, questioning and searching of everyman. Were this Court to sustain the constitutionality of Section 180-a after its application in this case, Judge Fuld's prophecy in his dissenting opinion in *Rivera*, 14 N.Y. 2d at 448, will be proved correct:

> "* * * a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches may be evaded and the exclusionary rule of *Mapp* v. *Ohio* (367 U.S. 643), to a large extent, written off the books."

Conclusion

For all of the foregoing reasons, Section 180-a of the New York Code of Criminal Procedure must be declared unconstitutional, and the judgment of conviction herein reversed, and the evidence suppressed.

Aug. 23, 1967.

Respectfully submitted,

KALMAN FINKEL
GRETCHEN WHITE OBERMAN
The Legal Aid Society
Counsel for Appellant